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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

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Navajo Nation Trust Leasing Act of 2000 Approval of Navajo Nation Regulations

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: On May 16, 2014, the Bureau of Indian Affairs (BIA) approved the Navajo Nation General Leasing Regulations under the Navajo Nation Trust Leasing Act of 2000. With this approval, the Tribe is authorized to enter into leases without BIA approval.

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Morales, Office of Trust Services – Division of Realty, Bureau of Indian Affairs; Telephone (202) 768-4166; Email cynthia.morales@bia.gov.

SUPPLEMENTARY INFORMATION:

I. Summary of the Navajo Nation Trust Leasing Act of 2000

The Navajo Nation Trust Leasing Act authorizes the Nation to issue leases for purposes authorized under 25 U.S.C. § 415(a) without the approval of the Secretary, provided the lease is executed under tribal regulations approved by the Secretary. Congress enacted the Leasing Act in 2000, to “establish a streamlined process for the Navajo Nation to lease trust lands without having the approval of the Secretary of the Interior for individual leases,” and “[t]o maintain, strengthen, and protect the Navajo Nation’s leasing power over Navajo trust lands.” Pub. L. 106-568 § 1202, 114 Stat. 2933 (Dec. 27, 2000). *See also* S. Rpt. 106-511 (Oct. 31, 2000). The Navajo Nation

Trust Leasing Act requires the Secretary to approve tribal regulations if the tribal regulations are consistent with the Department's leasing regulations at 25 CFR Part 162 and provide for an environmental review process that meets requirements set forth in the Act. This notice announces that the Secretary, through the Assistant Secretary – Indian Affairs, has approved the tribal regulations for the Navajo Nation.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian tribe with jurisdiction. *See* 25 C.F.R. § 162.017.

As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and tribal sovereignty.

77 FR 72,440, 72,447–48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under tribal leasing regulations approved by the Federal government pursuant to the Navajo Nation Trust Leasing Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)). In addition, as explained in the preamble to the revised leasing regulations at 25 C.F.R. Part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a

backdrop of “traditional notions of Indian self-government,” requires a particularized examination of the relevant State, Federal, and tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72,447–48, as supplemented by the analysis below.

The strong Federal and tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department’s leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to tribal leasing regulations approved under the Navajo Nation Trust Leasing Act. The Navajo Nation Trust Leasing Act was intended to “revitalize the distressed Navajo Reservation by promoting political self-determination, and encouraging economic self-sufficiency, including economic development that increases productivity and the standard of living for members of the Navajo Nation.” Pub. L. 106-568 § 1202, 114 Stat. 2933 (Dec. 27, 2000). Moreover, the Navajo Nation Trust Leasing Act was the model for the HEARTH (Helping Expedite and Advance Responsible Tribal Homeownership) Act of 2012, for which Congress’s overarching intent was to “allow tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in tribal communities.” 158 Cong. Rec. H. 2682 (May 15, 2012).

Assessment of State and local taxes would obstruct these express Federal policies supporting tribal economic development and self-determination, and also threaten substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (determining that “[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal

funding”). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a tribe that, as a result, might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. *See id.* at 2043–44 (finding that State and local taxes greatly discourage tribes from raising tax revenue from the same sources because the imposition of double taxation would impede tribal economic growth).

Just like BIA’s surface leasing regulations, tribal regulations under the Navajo Nation Trust Leasing Act pervasively cover all aspects of leasing. Furthermore, the Federal government remains involved in the tribal land leasing process by approving the tribal leasing regulations in the first instance. The Secretary also retains authority to take “all appropriate actions . . . in furtherance of the trust obligation of the United States to the Navajo Nation” and necessary actions remedy violations of tribal regulations, including cancelling the lease or rescinding approval of the tribal regulations and reassuming lease approval responsibilities. 25 U.S.C. 415(e). Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the tribal regulations according to the Part 162 regulations.

Accordingly, the Federal and tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by tribal leasing regulations or Part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Navajo Nation.

Dated: November 2, 2015

Kevin K. Washburn,
Assistant Secretary – Indian Affairs.

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